

February 21, 2017

IS THE AFFORDABLE CARE ACT GOING NOWHERE FAST?

From its inception the ACA has been and continues to be a highly politicized law. On January 20, 2017, just hours after being inaugurated, President Donald Trump signed his first executive order – taking aim at the ACA. A full month has passed since and some argue that little measurable progress has been made regarding the repeal and replacement of the ACA. This Alert serves as a brief update on the current status of the repeal/replace movement.

THE EXECUTIVE ORDER ON THE ACA

Signing the executive order seemed to signal that repealing the ACA had formally begun. After the order was signed, however, nothing changed because executive orders neither make nor repeal laws. They are more like long range mission statements used to set broad policy directions, rather than to effect quick surgical strikes. In this case, the executive order directs the executive administrative agencies on how they should approach the ACA going forward. Now the executive administrative agencies must take action, to the extent permitted by law.

President Trump's nominees for Secretary of HHS and for Treasury Secretary have only recently been confirmed and they have wasted no time acting under the executive order. President Trump's first Labor Secretary nominee withdrew from consideration last week and his replacement nominee has yet to begin the confirmation process as of this writing.

Here is what the executive order directs executive agencies administering the ACA to do:

- Reduce fiscal or regulatory burdens on states or private entities by waiving, deferring exempting or delaying the implementation of any ACA provisions
- Provide greater flexibility and cooperation to the states in implementing healthcare programs
- Encourage the development of free and open interstate markets for health services and health insurance

CMS (part of HHS) and the IRS (part of the Treasury Department) have each recently issued guidance on ACA related matters as a result of the executive order. This is the first such guidance on the ACA published by executive administrative agencies under the Trump administration. Thus far:

IN THIS ALERT

- The Trump Executive Order on the ACA and recent administrative action taken since its signing
- Legislative progress and the latest republican policy statement describing what replacement will look like
- Timing is everything – the latest signals as to when we can expect legislative action to begin in earnest
- What's next for employers in the near term

- The individual mandate coverage requirement (and applicable penalty) is still in effect, but the IRS has announced that it will not reject (but will process) “silent returns” -- individual income tax returns filed for 2016 that are silent on whether the taxpayer had health coverage required by the ACA’s individual mandate
 - The IRS indicated it may issue follow-up correspondence to the taxpayer regarding the lack of health coverage information after the filing process is complete
- CMS has proposed new regulations designed to encourage insurance carriers to stay in the ACA marketplaces (exchanges) by proposing policies to address stability, affordability and consumer choice

LEGISLATIVE PROGRESS – REPEAL / REPLACE

The two most vexing issues facing the Trump administration and the Republican controlled Congress are how to best approach repeal and replacement and the related timing issue.

To date no less than nine proposed plans have been introduced in the House or Senate and assigned bill numbers – some bills are quite short while others are rather lengthy. However, there has not been much in the way of consensus as to the merit of these plans or to timing in general. There are also issues involving collaboration with democrats, whether a minimum 51 or 60 Senate votes will be required for passage depending on the nature of the ACA repeal/replacement provision, and the potential for a democrat filibuster in the Senate if at least 60 votes are required (because republicans have only a 52 vote majority).

A full review of all nine bills proposed to date is beyond this Alert’s scope. Of the nine bills, four are relatively comprehensive and contain many common elements such as expanding HSA limits and eligibility, purchasing individual market coverage across state lines, state high risk pools, Medicaid funding reform and, of course, repeal of the current ACA provisions. There are unique differences among these comprehensive proposals as well.

The remaining five bills are limited in scope and attempt to accomplish more narrow goals. For example, the shortest of the bills repeals the ACA and resets applicable federal law to the day before the ACA was enacted. Another bill would give Americans access to all of the health options available to federal employees under the Federal Employee Health Benefit Program (FEHB).

NOTE: The replacement health care plan design to watch may be the outline of the House’s proposal to repeal and replace the ACA, just released to House members on February 17, 2017 by House Speaker Paul Ryan. The proposal is called the “[Obamacare Repeal and Replace - Policy Brief and Resource](#).” Under this latest proposal:

- Relief will be provided during the transition period by immediately reducing to zero the penalty taxes for the individual mandate and the employer mandate

- A new portable monthly tax credit that is both advanceable and refundable would be available to assist with the purchase of any health insurance plan approved by a state and sold in its individual insurance market
 - The credit would be portable and age-rated and would be available for dependent children up to age 26
 - The credit would not be available to individuals eligible for coverage through an employer or government program
- HSAs would be enhanced to make them more flexible and accessible
 - The maximum HSA contribution limit would be increased from \$3,400 to \$6,550 for self-only coverage and from \$6,750 to \$13,100 for family coverage
 - Both spouses would be allowed to make catch-up contributions to the same HSA
- Medicaid would be modernized by putting it on a budget through Medicaid financing reform (either per capita allotments or Medicaid block grants)
- State Innovation Grants would be made available, according to the Policy Brief, to help repair state markets damaged by the ACA, including the creation of the next generation in state high risk pools

Aside from the immediate reduction in mandate penalties to zero, nothing in this latest House proposal is new or surprising, but it is the latest on the street as of this writing and carries significant weight given its source.

THE TIMING TWO-STEP

Timing for the repeal and replace movement continues to evolve and is mostly dependent on the legislative approach taken. Will it be a simultaneous repeal and replace? Repeal then replace? Or enact a replacement program and then dismantle the ACA over time? Regardless, a two-step process is required. Time is necessary to implement any replacement program and to wind down repealed ACA provisions and requirements. After all, it's taken seven years of ACA implementation to get this far. Action sooner rather than later is preferable so that individuals, businesses and insurance carriers all have time to plan, design and implement.

Timing signals thus far have been mixed. Early in January the preferred strategy seemed to be repealing as much of the ACA as possible. By mid-January, the likely approach looked to be simultaneous repeal and replacement. Later in January, piecemeal replacement while repeal legislation was winding through Congress seemed to become the go-to approach. Then, President Trump hinted during his pre-Super Bowl interview that replacement could extend into 2018. Two days later House Speaker Paul Ryan corrected the record indicating that ACA legislation would be done by the end of the year (although the implementation process would likely take longer). During his February 18, 2017 rally in Florida, President Trump declared that his administration would be submitting an ACA replacement plan "in a couple of weeks." This seems reasonable given the recent distribution of Paul Ryan's Policy Brief to House members last week.

What will the Republican replacement plan look like initially? Chances are it will look very much like Paul Ryan's recent Policy Brief. Time will tell.

EMPLOYER PLANNING FOR THE NEAR TERM – STAY CALM AND CARRY ON

Nothing is certain in 2017 with respect to the ACA except change, whatever that may be. 2017 will be an interesting ride. In the interim, stakeholders such as individual consumers, businesses and insurance carriers must make decisions about health care nonetheless.

Employers should stay the course with respect to ACA compliance for the near future. Group health plan renewals for plan years beginning in 2016 will likely be unaffected by the repeal and replace movement. A post-repeal/replace transition period for planning, design and implementation of changes is a reasonable expectation under the circumstances regardless of what reform is enacted, or when it occurs.

In the coming months, we are also likely to see changes in ACA enforcement activity by various executive administrative agencies. However, please note that no action has been taken to date that relieves any insurance carrier, applicable large employer (ALE) or other plan sponsor from their ACA reporting responsibilities under the individual mandate or the employer mandate (Forms 1095-B and C). Filings are due (as applicable) by February 28, 2017 (paper filing), March 2, 2017 (furnish to employees) and March 31, 2017 (electronic filing).

Buckle up, as they say in the roller coaster industry. This ride is about to start.

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